

BOARD OF PESTICIDES CONTROL

March 31, 2006

Emerald Banquet Room, Bangor Motor Inn
701 Hogan Road, Bangor

AGENDA/MINUTES

8:30 A.M.

Chair Carol Eckert called the meeting to order at 8:35 A.M. Other members in attendance included Humphries, Jemison, Berry and Simonds. Bradstreet had recently resigned from the Board to become Commissioner of Agriculture and Walton was unable to attend. Assistant Attorney General Mark Randlett was also present.

1. Introductions of Board and Staff

- ☒ The members and staff introduced themselves.

2. Continuation of Public Hearing on Proposed Amendments to Chapters 22, 28 and 40

Representatives of the Toxics Action Center and Environment Maine submitted over 150 verified signatures on each of three petitions to amend three chapters of the Board's regulations. Additional details on the proposed amendments were described in the public hearing notice published in major newspapers on March 8th. Copies of the proposed rules are available upon request or may be viewed on the Board's website at www.thinkfirstspraylast.org. The public hearing commenced the previous evening and will be continued this morning.

A sign up sheet will be available at the door for persons wishing to present information about the proposed rule. Written comments may be submitted to the Board's address above until 4:00 P.M. on Friday, April 14, 2006.

- ☒ A court reporter transcribed the public hearing and prepared a separate transcript of the proceeding.

3. Minutes of the February 24, 2006 Board Meeting

Action Needed: Amend and/or Approve

- ☒ Berry/Simonds: Motion made and seconded to approve the minutes.

In Favor: Unanimous

4. Basham Tree Service's Request for Variance for Municipal Roadside Vegetation Management Program

The Board's drift regulations allow applicators to seek a variance from any standards they feel are unreasonable for their type of operation. This firm regularly conducts highway

vegetation control activities as a contractor for the Maine Department of Transportation (MDOT) and has been requested to control brush on town roads in Harmony, Troy, Caratunk and China. They are seeking a variance so they do not have to record all sensitive areas within 500 feet of the town roads. Instead, they propose taking a number of other precautions that include offering no spray agreements, following MDOT buffer standards, employing several drift control measures and providing public notification through postings and newspaper listings.

Presentation By: Robert Batteeese
Director

Action Needed: Approve/Deny Variance Request

- ☒ Jennings stated that Basham Tree had 12 years of experience treating roadside vegetation under contract to MDOT and that Tim Basham communicates with the Board's staff regularly. The Company will employ the same precautions that MDOT uses. Humphreys pointed out that the company had a violation in 2005.

Berry/Humphreys: Motion made and seconded to approve the variance request.

In Favor: Unanimous

5. Workshop Session to Review the Rule-making Record for Proposed Chapter 26

A public hearing was held on February 24, 2006 on proposed rule Chapter 26 to set standards for pesticide applications and notification for all occupied buildings except K-12 schools. Six people offered oral testimony on the rule. Four written comments were received prior to the close of the comment period on March 10th. The staff has prepared a summary of comments and staff response for the Board members to review.

Presentation By: Henry Jennings
Chief of Compliance

Action Needed: Discussion and determination on how the members wish to proceed with the proposed rule.

Please note the Board will not entertain any questions or additional comment from persons in the audience during this or any future workshops needed to determine if the Board will be adopting this new rule.

- ☒ Jennings directed Board members to the summary of comments and suggested they focus on the four areas of concern outlined in the letter from Gene Harrington of the National Pest Management Association (NPMA). Members first discussed the suggestion that crack and crevice treatments should be exempt from the proposed notification requirements. After discussing exemptions that would allow this method of application in certain urgent situations, the Board found these options unworkable and reached consensus to retain the notice requirements for crack and crevice treatments. Next the Board discussed the suggestion that FIFRA Section 25(B) be exempt from the entire rule. The staff pointed out that many 25(B) products are already exempt from the notification requirements, and use of 25(B) products is consistent with the intent of sections four and five. Liquid 25(B) products, especially aerosols, still contain volatile

components and pose risks to people with allergies or respiratory conditions. Consensus was reached not to exempt 25(B) products.

The Board then discussed the “tenant privacy issues” as described by the NPMA. The staff stated it was not the intent of the proposed rule to require notification of residents whose dwelling was not scheduled for treatment. Consensus was reached to insert into Section 3(A)1 the word “unit” after apartment and condominium and to change residence to residential unit to make the intent clear.

Staff also noted some comments raised concerns about the language in Section 3(D) of the proposed rule. Commenters stated property owners would be reluctant to disclose pest problems they were having treated, such as bed bugs. The staff felt this information was not critical to the intent of the rule. It was decided to delete this requirement from the section 3(D). Similarly, the Board agreed that varying somewhat from the proposed date and time detailed in response to an inquiry should not be cause to cancel a pesticide application. They suggested the word “proposed” in section 3(D) be changed to “approximate”, “planned” or “intended”.

The Board then reviewed concerns about the language in that section that some interpret as suggesting that all eight informational items must be provided whenever a request for any information is received. Consensus was reached to modify the language so that it is clear that applicators must only supply information that is requested.

Finally, the Board discussed who should ultimately be responsible for ensuring that the notification requirements proposed in Chapter 26 are met, the applicator, or the person requesting the treatment. The Board recognized there would be times when it would be impractical for the applicator to carry out this function. Consequently, they instructed the staff to craft language similar to that contained in Chapter 51 and the Worker Protection Standard, whereby the applicator provides materials and instructions to the person contracting for the application to carry out the notice provisions. Before proceeding with the application, the applicator must receive assurances that the notice requirements had been met.

6. Enforcement Action Against S & T Property Maintenance of Hermon

The staff will detail the results of an anonymous complaint about herbicide spraying at the former Ames Store in Augusta. A staff investigation revealed that the company made an application of Ortho Total Vegetation Killer to the area where the sidewalk abuts the parking lot and did not have anyone licensed. This action constitutes violations of the Board’s statute and regulations requiring that a person be licensed as a commercial applicator in order to perform custom applications. To date, the company has failed to respond to a staff offer to negotiate a consent agreement.

Presentation By: Henry Jennings
Chief of Compliance

Action Needed: Decision on appropriate enforcement response.

☒ Jennings asked the Board to table the matter for procedural reasons.

Simonds/Humphreys: Motion made and seconded to table the matter.

In Favor: Unanimous

7. Consideration of Staff Negotiated Consent Agreement with Sandy River Farms of Farmington

On June 3, 1998, the Board amended its Enforcement Protocol to authorize staff to work with the Attorney General and negotiate consent agreements in advance in matters not involving substantial threats to the environment or public health. This procedure was designed for cases where there is no dispute of material facts or law, and the violator admits to the violation and acknowledges a willingness to pay a fine and resolve the matter. This case resulted from inspections at a dairy and vegetable farm over a three-year period that revealed the owner had failed to provide pesticide safety training and post required information at a central location as required under the federal Worker Protection Standard.

Presentation By: Henry Jennings
Chief of Compliance

Action Needed: Approve/disapprove the consent agreement negotiated by staff.

- ☒ Jennings noted that EPA has been pushing states to vigorously enforce the WPS, especially in instances where violations have not been corrected.

Simonds/Humphreys: Motion made and seconded to approve the consent agreement.

In Favor: Unanimous

8. Consideration of Staff Negotiated Consent Agreement with TruGreen ChemLawn of Westbrook

This case is similar to the preceding agenda topic where there is no dispute of material facts or law, and the violator admits to the violation and acknowledges a willingness to pay a fine and resolve the matter. This case involved a lawn care company that continued to operate at their normal level of pesticide applications in the Portland area during the week of May 22, 2005. A staff investigation revealed that this was an extremely wet period with 4.11 inches of precipitation recorded at the Portland Jetport. The pesticide label on one of the herbicides applied contained the statement “do not apply if rainfall is expected within 48 hours”, and one of the insecticide labels contained the statement “applications should not be made when turf grass areas are waterlogged or soil is saturated”. These actions constitute a violation of the Board’s statute that make it unlawful to use a pesticide inconsistent with its labeling and to apply pesticides in a manner that is potentially harmful to the environment.

Presentation By: Henry Jennings
Chief of Compliance

Action Needed: Approve/disapprove the consent agreement negotiated by staff.

- ☒ Jennings noted the Board had directed the staff to pursue enforcement action where there was no evidence that companies modified their application practices during this especially wet stretch of weather.

Berry/Jemison: Motion made and seconded to approve the consent agreement.

9. Other Old or New Business

a. Legislative Update – R. Batteese

☒ Jennings reviewed the status of LD 2065 which would increase the pesticide registration fee by \$25/product. The ACF Committee voted the bill out ought to pass. LD 1657 that relates to Browntail Moth spraying has also moved through the ACF Committee and will impose temporary buffer zones and require monitoring by the BPC if passed by the full legislature. LD 1791 that sought to add two additional Board members, has been withdrawn with an agreement that the Governor will appoint a structural pest control professional to the Board.

b. Variance Granted to RWC, Inc. of Westfield, Massachusetts
for 2006 Railroad Vegetation Management Program – R. Batteese

☒ Jennings alerted members to the variance permit that had been renewed for RWC, Inc. Humphreys asked whether monitoring could be required as part of a future permit. Jennings stated that RWC has been very cooperative about communicating their spray plans to the staff.

c. Office of Management and Budget's Pesticide Enforcement Measures – Henry Jennings

☒ Jennings reviewed the performance measurement guidance issued by the Office of Management and Budget for the state pesticide enforcement programs. Good performance will be indicated when, 1) a high percentage of inspections result in an enforcement action, 2) a low percentage of enforcement actions are directed at repeat violators, and 3) the number of enforcement actions is high versus the total cost of the enforcement program. Board staff feels these measures will create incentives to target businesses where violations will likely be found and to take stringent enforcement actions to deter repeat violations.

d. Other ???

☒ No additional topics were discussed.

10. Schedule and Location of Future Meetings

a. Date and location for the next meeting tentatively scheduled for May 3rd or 12th.

b. Date and location for the following meeting.

☒ May 12 was selected for the next Board Meeting to be held in Waterville. In addition, the Board selected June 9 as a tentative date for a planning session and June 16 as the tentative date for a June Board Meeting.

11. Adjourn

- ☒ A motion to adjourn was accepted at 12:40 P.M.

Henry Jennings
Chief of Compliance